IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.149 OF 2004

In

WRIT PETITION NO.2950 OF 2003

Permanent Magnets Ltd.
Dattapada Road, Borivli (E)
Mumbai--400 066. : Appellant
(Orig.Petitioner)

V/s.

1. Shri Gajanan L. Borkar
"Aashadeep" Co-op. Hsg. Soc.
Plot No.46, Room No.C-16,
Gorai, Borivli (W),
Mumbai--400 092.
2. Hon'ble Member
Industrial Tribunal
New Administrative Bldg.
Bandra (E)
Mumbai--400 051. : Respondents
(Orig.Respondents)

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Mr.S.K.More i/b. Mr.S.M.Naik for the appellant.

Mr.A.D.Shetty with Ms Rita K. Joshi i/b.Mr.R.D.Bhat for respondent no.1.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : DECEMBER 13, 2006.

ORAL JUDGEMENT (Per R.M.Lodha,J.)

1. On 24.11.2006, we passed the following order:-

> "1. Section 33 of the Industrial Disputes Act, 1947 reads thus:-
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> "33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.--(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall--
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> (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
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> (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute,
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> save with the express permission in writing of the authority before which the proceeding is pending.
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> (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman--

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute--

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being a member of the executive or other office bearer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one per cent of the total number of workmen

employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, an arbitrator a Labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, within a period of three months from the date of receipt of such application, such order in relation thereto as it deems fit:

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed."

2. It is not disputed that section 33(2)(b) was attracted to the facts of the present case. The only question in the appeal is as to whether the workman was paid one month’s wages at the time of the order of dismissal. The legal position is no more res integra. To satisfy the condition as provided in the proviso appended to section 33(2)(b), the employer is required to pay or tender the wages to the workman. In Strawboard Manufacturing Company v. Gobind, 1962 I L.L.J. 420, the Supreme Court stated that though section 33 speaks of payment of one month’s wages, it can only mean that the employer has tendered the wages and that would amount to payment.

3. In the approval application made by the

appellant (employer), it is stated that the employer has simultaneously sent by money order one month's wages as required under section 33(2)(b) of the Industrial Disputes Act, 1947. In his reply, the respondent no.1 (workman) denied the compliance of the mandatory provisions contained in section 33(2)(b) and stated that the employer has not paid wages for one month, as required in law.

4. That the burden is on the employer to prove the compliance with the mandatory provisions contained in the proviso appended to section 33(2)(b) is not denied.

5. It is true that the employer did not lead any evidence before the Industrial Tribunal to prove the factum of payment/tender of one month's wages to the workman simultaneous to the order of dismissal. The cross-examination of the workman, however, shows that the Advocate for the employer reserved his right to cross-examine the workman on points other than the manner of inquiry.

6. The Industrial Tribunal, after hearing the parties, by its order dated 17.6.2002 dismissed the approval application by holding that the pre-requisite condition of payment of one month's wages to the workman has not been proved.

7. The employer immediately thereafter made the application for review of the order dated 17.6.2002. The following statement made in the review application is pertinent to be noticed:-

> "..... The applicant submits that admittedly the money order receipt are annexed to the main application and there to some extent public documents which do not requires any further proof. ....."

The review application was, however, dismissed by the Industrial Tribunal on 21.4.2003 holding that the order dated 17.6.2002 did not require review.

8. The employer filed Writ Petition before this Court. The said Writ Petition was dismissed by the learned single Judge by the

impugned order dated 18.12.2003 by holding thus:-

> "The approval was rejected on the footing that one month's salary was not tendered. In the application there was averment that the amount had been tendered by a money order. In the reply the contention of the workman was that mandatory requirement of Section 33(2)(b) had not been followed. I am informed that the original money order receipt was annexed with the original approval application. Perusal of the application does not indicate that in fact it was so annexed. Though the approval application was made by the employer, the employer did not commence evidence or did not in fact lead any evidence. The respondent-workman stepped into the witness box. In his evidence he has stated that he has not received his pay. There is no cross examination on this point and the Advocate for the Petitioner claimed to reserve his cross examination. It is argued to the bar that cross examination was reserved as only the issue regarding fairness of the enquiry was being considered. He is not able to point out any order of the Court by which the said issue was framed as preliminary issue. There cannot be any adjudication by parts. Though there might be presumption arising out of postal documents, that presumption is rebuttable. In the present case, no efforts have been made by the Petitioner to firstly tender the money order receipt by way of evidence. He could have examined an officer to show that the money order was sent. He could have examined postal authority. The Respondent workman was entitled to cross-examine any such person. In the absence of any efforts made by the Petitioner and in the absence of any material before the Court, it cannot be said that the order passed is erroneous."

9. The counsel for the parties agreed that the original record of the Industrial Tribunal was not before the learned single Judge at the time of consideration of the Writ Petition.

> The learned counsel for the employer also invited our attention to the xerox copy of the receipts from Borivli post office indicating that the amount mentioned therein was received by the post office, being the amount of money order payable to the workman Gajanan L. Borkar. These receipts also prima facie lead to the presumption that money, as mentioned in the receipts, was tendered to Borivli post office for being paid to the workman through money order. In ordinary course, from this fact, the presumption could also be drawn that the said amount must have been tendered by the employer to the postal authorities for the workman. Be that as it may, before we deal with the matter further, we are of the view that the record and proceedings of Application (IT) No.15 of 1999 in Reference (IT) No.97 of 1992 and Review Application (IT) No.3 of 2003 in Application (IT) No.15 of 1999 in Reference (IT) No.97 of 1992 (M/s.Permanent Magnets Ltd. v. Mr.Gajanan L. Borkar) be called for by the office from the Industrial Tribunal Maharashtra at Mumbai. The requisition may be handed 'dasti' to Mr.R.D. Bhat, the counsel for the respondent no.1, by the office as early as possible and positively within five days from today. The Industrial Tribunal Maharashtra at Mumbai is directed to send the record pertaining to the aforesaid applications within three days of the receipt of the requisition.
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> 10. Let the appeal be posted for final hearing on 6.12.2006."

2. Pursuant thereto, the original record of the Industrial Tribunal pertaining to Application (IT) No.15 of 1999 in Reference (IT) No.97 of 1992 and Review Application (IT) No.3 of 2003 in Application (IT) No.15 of 1999 in Reference (IT) No.97 of 1992 was sent by the Industrial Tribunal. The record contains xerox copy of the receipts from Borivli post office indicating that the amount mentioned therein was received by the post office

being the amount of money order payable to Mr.Gajanan L. Borkar. The counsel for the parties agreed that the matter may be sent back to the Industrial Tribunal, Maharashtra at Mumbai for fresh decision of the application under section 33(2)(b), after recording the evidence of the appellant on the aspect that the amount was sent by money order to the workman Mr.Gajanan L. Borkar and the evidence of the respondent no.1 in rebuttal.

3. We, accordingly, dispose of the appeal by the following order:-

(i) The order of the learned single Judge dated 18.12.2003 and the orders dated 17.6.2002 and 21.4.2003 passed by the Industrial Tribunal Maharashtra at Mumbai are set aside.

(ii) Application (IT) No.15 of 1999 in Reference (IT) No.97 of 1992 (M/s.Permanent Magnets Ltd. v. Gajanan L. Borkar) is restored to the file of the Industrial Tribunal Maharashtra at Mumbai for fresh consideration and disposal, in accordance with law.

(iii) Since the matter is quite old, we request the Industrial Tribunal to hear and decide the said

application expeditiously, after permitting the employer (appellant) to lead evidence in support of its case that the wages for one month were sent by money order to the workman (respondent no.1) as required under section 33(2)(b) of the Industrial Disputes Act, 1947, and evidence by the respondent no.1 in rebuttal.

(iv) No order as to costs.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.